

September 2017

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Charles H. Wilson, Jr., Williams & Connolly Washington, D.C.

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ESEA TITLE I LITIGATION—A NATIONAL VIEW

CHARLES H. WILSON, JR., ESQUIRE

I have been invited here today to discuss a new endangered species—Title I of the Elementary and Secondary Education Act of 1965.¹ Those who were at the Washington meeting last year hardly would have expected me to be describing title I in these terms. Last year's meeting was held just 3 weeks after a three-judge court in New York unanimously upheld the constitutionality of title I in the case of *National Coalition for Public Education and Religious Liberty v. Harris* (*PEARL*).² At that time, we were looking forward to an inevitable appeal to the Supreme Court, and hoped for a definitive resolution of the constitutionality of title I.³ Unfortunately, there was a failure to file a notice of appeal with the district court within the 60 days prescribed by the statute, and the Supreme Court thereafter dismissed the appeal for want of jurisdiction.

The consequences of that dismissal have been severe. At the time of the lower court ruling in New York, four other title I cases had been stayed, pending the expected decision by the Supreme Court in the *PEARL* case. The assumption of the courts was that because *PEARL* was the last of the three-judge cases, with a right of direct appeal to the Supreme Court, it would be the most expeditious vehicle to resolving the issue of title I. The other pending cases were before single judge district courts whose decisions would be appealed to the courts of appeal before going to the Supreme Court. The dismissal of the *PEARL* appeal means that those other title I cases are free to be appealed as the parties and courts desire. Moreover, apparently anticipating the dismissal of the

¹ Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified in scattered sections of 20 U.S.C.). The Act provides federal funding to local school districts to make available remedial educational services to public and nonpublic schools. *Id.*

² 489 F. Supp. 1248 (S.D.N.Y.), *appeal dismissed sub nom.* National Coalition for Pub. Educ. & Religious Liberty v. Hufstedler, 449 U.S. 808 (1980) [hereinafter cited as *PEARL*].

³ See Wilson, *National Coalition for Public Education & Religious Liberty v. Harris*, 26 CATH. LAW. 209, 212 (1981).

PEARL appeal, Americans United for Separation of Church and State, Inc. (Americans United), filed a fifth title I suit in Louisville, Kentucky. Today, therefore, title I is under constitutional attack in five different lawsuits.

Litigation, however, is not the only threat to the survival of title I. Perhaps the most serious threat is currently before Congress. The Reagan Administration has proposed legislation to consolidate funds, presently appropriated under a number of education acts, into a single block grant to the states.⁴ That legislation, if passed by Congress in the form proposed, effectively will doom title I.

What I would like to do is review the status of the five pending title I cases by briefly highlighting some of the emerging problems, and by outlining the strategy that we are trying to develop, in conjunction with the Justice Department, to somehow control the movement of those cases toward the Supreme Court.

Before discussing the status of the pending cases, I would like to explain their common issue and the basic source of the constitutional problem. In all five cases, the issue is whether it is constitutional for local school districts to use funds appropriated under title I to hire and send teachers, who are public school employees, onto the premises of parochial schools during the regular school day to provide supplemental remedial instruction in reading and mathematics.⁵

The difficulty with these cases stems from the Supreme Court's ruling in *Meek v. Pittenger*,⁶ a case involving a Pennsylvania statute, which resembles title I.⁷ Under the Pennsylvania program, special teachers hired by local school districts were sent into the parochial schools during the school day to provide supplemental remedial instruction. The Supreme Court ruled that the program was unconstitutional.⁸ The premise for the Court's decision was that Catholic schools are pervasively sectarian in their operation.⁹ The Court ruled that there was a risk, a danger,

⁴ S. 1103, 97th Cong., 1st Sess., 127 CONG. REC. 4329-33 (1981).

⁵ See note 7 *infra*.

⁶ 421 U.S. 349 (1975).

⁷ See *id.* at 352-57. In *Meek*, Pennsylvania laws that authorized the provision of textbooks, instructional equipment and auxiliary services to nonpublic schools were challenged. *Id.* at 351; see 24 PA. CONS. STAT. ANN. §§ 9-972 to -973 (Purdon Supp. 1982). The Court upheld the loan of textbooks on the theory that these loans were made to schoolchildren, rather than directly to the school. 421 U.S. at 361-62. The law authorizing the provision of instructional equipment was held unconstitutional as the equipment was loaned directly to the nonpublic schools, which were primarily church-related. *Id.* at 362-66. The auxiliary services section was struck down on the premise that direct involvement between the private school officials and the teachers providing the services would result in unconstitutional entanglement between church and state. *Id.* at 367-72.

⁸ 421 U.S. at 372.

⁹ *Id.* at 371.

or a potential that any person, including a public schoolteacher, treading upon those pervasively religious premises, would be induced to inject religion into the context of his teaching.¹⁰ The Court made the rather incredible statement that it is almost as easy to inject religion into a remedial mathematics course as it is in a course in medieval history.¹¹

The Court perceived a further potential risk in that there might be disputes or disagreements over the content and structure of the remedial courses between the principals of the parochial schools and the publicly employed remedial teachers. These potential disputes and disagreements could produce a type of unconstitutional entanglement. It is against the background of those concerns that title I has been under attack since 1976 when the *PEARL* case was filed. On these grounds, the Court struck down the Pennsylvania program.¹²

Let me describe briefly the status of the pending cases. The oldest of the cases is *Wamble v. Bell*, a suit which was filed in April, 1977, but which was stayed pending the outcome of *PEARL*. The *Wamble* case is somewhat unique in that it is the only case that has been filed challenging the bypass provisions of title I.¹³ Bypass procedures were included in the 1974 amendments to title I and provide that if a local school district does not provide equitable title I services to nonpublic school students, the federal government will relieve the local school district of its responsibility and will make arrangements for providing those services through a private contractor.¹⁴

I must say that the *Wamble* case presents the biggest headache when compared to the other pending cases. The plaintiff, who is proceeding pro se, is an ordained Baptist minister and a church historian by profession. As an historian, Mr. Wamble has a fascination for detail. He has taken more than fifty depositions and has announced his intention to take at least thirty more. In total, he has marked more than 1,160 documents as deposition exhibits. We also have been served with approximately 232 pages of requests for admissions.

The fortunate part about the stay that was issued in that case was that between issuance and dissolution of the stay, there was a change of judges. The judge now assigned to the case, Judge Wright, has made it quite clear that he will not tolerate, as his predecessor had, Mr. Wamble's aimless and rambling discovery. We had a status conference on October

¹⁰ *Id.* at 369-70 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 618-19 (1971)).

¹¹ 421 U.S. at 370-71.

¹² *Id.* at 372.

¹³ See 20 U.S.C. § 2740(b) (Supp. III 1979).

¹⁴ *Id.* The bypass procedure, as originally enacted in 1974, was embodied in 20 U.S.C. § 241e-1(b) (1976) (repealed 1978). In 1978, section 2740(b) was enacted to replace the repealed statute. See 20 U.S.C. § 2740(b) (Supp. III 1979).

31, 1980, and Judge Wright was visibly agitated with Mr. Wamble's run-away discovery. He issued a rather unique order, directing the parties to meet, narrow the factual issues in dispute, and come up with a schedule for discovery, thereby moving the case toward trial. He also ordered that no discovery take place until those negotiations were completed. We have had sporadic talks with Mr. Wamble and Lee Boothby of Americans United, who has represented the plaintiff-intervenors over the past 6 months. Incidentally, at the status conference, Judge Wright told Mr. Wamble that he would not even read the 232 pages of requests for admissions, let alone the responses. We are, therefore, not too concerned about those requests.

A second title I case pending in Minneapolis is *Stark v. Bell*. That case was filed in March, 1978, and named only federal officials as defendants. Before it was required to answer, the Justice Department managed to obtain a stay. The stay was dissolved in November, 1980, following the dismissal of the *PEARL* appeal, and parents of parochial school students were permitted to intervene in early March. We had a status conference at the time the motion to intervene was heard, and the court has set a trial schedule. We are to have all discovery completed by April 1, 1982, and must be prepared for trial any time after June 1 of that year.

A third title I case is *Barnes v. Bell*, filed in Louisville in September, 1980. The unique feature of this case is that it is the first title I case in which an archbishop, the Archbishop of Louisville, has been named as a defendant. Also named were an assistant superintendent of schools for the archdiocese, and eighteen parochial schools. We do not know why the Archbishop was named as a party. A motion to dismiss on the ground that no relief can be granted against the Archbishop recently was denied, but with leave to renew the motion at a later time. Lee Boothby of Americans United is the lead counsel for the plaintiffs in that case. Since filing the complaint, he has done absolutely nothing but oppose our motion to intervene and the Archbishop's motion to dismiss.

The fourth case was filed by a group in San Francisco called United Americans for Public Schools. The complaint was filed in March, 1978, and again, named only federal officials as defendants. The Justice Department was able to obtain a stay pending the outcome of both *PEARL* and *Wamble*. Since the *PEARL* appeal was dismissed, neither the parties nor the court have done anything to dissolve the stay.

Finally, there is a title I case, *Felton v. Bell*, pending in the Eastern District of New York. The complaint, which is a virtual carbon copy of the *PEARL* complaint, was filed in August, 1978. The named defendants are two federal officials and the Chancellor of the New York City Board of Education. As in the previous two cases, the stay was granted prior to the filing of any answers, and again nothing has been done to dissolve the stay since the *PEARL* appeal was dismissed.

Of the five title I cases that are now pending, therefore, three are relatively active, and two are completely inactive. In each of these cases, however, we have uncovered problems that we did not encounter in *PEARL*. In *Wamble*, for instance, the problems include the bypass contractor's status as a nonprofit corporation. The problems are more serious in some of the other cases, but because those cases have been relatively inactive, the plaintiffs have not yet uncovered them.

That there are problems of a constitutional dimension in some of the pending title I cases is significant for two reasons. First, we had assumed, somewhat naively, that the title I program we defended in New York was a model of title I instruction around the country. What we have discovered is that there are great deviations from the *PEARL* model, and in my view, the greater the deviation, the greater the risk that the program will fail. I am not suggesting, however, that there are no programs that conform to the *PEARL* model. For example, in St. Paul, Minnesota, we have found a program that is probably better than the *PEARL* program. In St. Paul, there are fifteen certified teachers who provide title I instruction in parochial schools. Nine of those teachers spend half of their day in parochial schools and spend the other half in a public school. The evidence we can produce there will be devastating. We will have nine teachers testifying that "no matter which building I am in, no matter what time of day, I teach my subject the same way, and there is no influence of that so-called sectarian atmosphere on my teaching in the parochial schools."

The second problem that has been disclosed by these deviations is that the policing of title I is really very loose. There is virtually no monitoring at the federal level. At the state level, so few resources are allocated for title I administration that each local school district is substantially free to do as it wishes. A consequence of this is the greater burden it places on diocesan and archdiocesan school offices to scrutinize the way title I is being implemented within their particular jurisdictions and to discover incipient problems that could be intercepted before a lawsuit is filed. As we all know, any changes made in a program once a suit is filed will be viewed with great suspicion. Since the federal government is involved in all five of these pending cases, one would think that, by now, some overall strategy has been developed by the Justice Department to move ahead the most favorable case and wage a successful defense of title I. No such strategy exists. The Justice Department has assigned the five title I cases to three different lawyers who have utterly failed to coordinate their efforts.

I have previously mentioned the *Felton* case pending in the Eastern District of New York. Not only is the complaint a carbon copy of the *PEARL* complaint, but the naming of the Chancellor of the New York City Board of Education as defendant suggests quite clearly that the scope of the attack in *Felton* will be identical to that of *PEARL*—the

New York City Board of Education's program. I proposed to the Justice Department that it consider filing, simultaneously, a motion to dissolve the stay and a motion for summary judgment. The motion for summary judgment would be predicated upon an affidavit from the Chancellor of the New York City Board of Education stating that the title I program for nonpublic school students in New York City is accurately described in the record and opinion in the *PEARL* case, and that there have since been no significant changes in the administration of that program. Armed with the affidavit and with the record of the *PEARL* case, the proposed motion for summary judgment would provide a vehicle to get the *PEARL* record back into a court and on a track to the Second Circuit, and eventually the Supreme Court.

Our strategy is not to get any of these title I cases before the Supreme Court for a ruling on the merits. Our strategy is to find a case that most likely will be held constitutional by the court of appeals. Such a ruling by a court of appeals would require those challenging title I to seek Supreme Court review by a writ of certiorari. If the program is held unconstitutional by the Second Circuit, we have a right to appeal; if a favorable ruling in the court of appeals is obtained, we would be delighted to see the Supreme Court deny certiorari. The latter result will signal that the Court is not interested in grappling with a constitutional challenge to a federal statute and indicate to other plaintiffs, or potential plaintiffs, that they should concentrate their resources elsewhere.

If this strategy does not work, or if the Justice Department continues to resist it, we have very little control over how the other pending cases will develop. For example, the Minnesota case presents an interesting concept. The plaintiffs' lawyers have decided that they will not limit their challenge to Minneapolis and St. Paul. They intend to find other local school districts that have bad programs. As I mentioned earlier, we have found a very good program in St. Paul, and the burden will be shifted to our side to find other good programs. If we go into court, and the plaintiffs show some obviously bad programs and we show some obviously good ones, it will not be possible for that court to issue a *Decker*-type injunction, that is, an injunction against the program. The most the court can then do is enjoin those programs that deviate from the *PEARL* model or fail to fall within the prescriptions of *Meek*,¹⁵ thus, upholding the other programs. I think that if the Minnesota case becomes the first to move along, the risks of an unfavorable decision that would have nationwide impact is minimized by the very approach the plaintiffs have taken.

In the *Wamble* case, we must contend with Mr. Wamble, who is clearly restless. Although he has his teaching obligations during the regu-

¹⁵ *Meek v. Pittenger*, 421 U.S. 349 (1975); see note 7 and accompanying text *supra*.

lar school year, summer is coming. Once he is free of his teaching obligations, we expect that he will be quite anxious to resume his seemingly endless discovery. Frankly, I cannot predict how quickly the *Wamble* case can proceed to trial.

The Kentucky case involves a relatively small program. We are ready to go to trial on two weeks notice since we have done all of our pretrial work. This case is the newest of the title I cases, however, and we are not experiencing the same pressure that we are in *Wamble* and *Stark*. Thus, we suspect that *Wamble* and *Stark* will move ahead, if we cannot carry out the *Felton* strategy.

Everything that I have discussed could well be rendered academic by Congress. Last week, the administration introduced in Congress the Elementary and Secondary Education Consolidation Act of 1981.¹⁶ That bill is the Reagan administration's proposal for consolidating a large number of federal education programs into what have been called block grants. The money under these block grants is funneled to the states with fewer strings than are attached to the present programs.¹⁷ The Act repeals title I and provides that it will take effect on October 1, 1981.¹⁸ If it is enacted, and if the repeal of Title I is retained in the bill, the five cases that I have just discussed will become moot.

Additionally, I should alert you that the Act has far graver consequences for nonpublic schools than simply the loss of title I. Title I is a very significant federal program. Although no money flows to the schools, the services provided by these remedial teachers is critically important to many students in the inner city schools who need remedial educational services. The major problem with the block-grant approach, however, is that it makes noncategorical all existing categorical programs. By making the programs noncategorical, a state cannot be required to provide a particular form of service.

The Act specifies the constituency for whom programs can be developed under the statute, that is, children in areas that have high concentrations of educationally deprived students, handicapped students and students attending schools undergoing desegregation. Those groups are the beneficiaries of the block-grant proposal. The statute, however, suggests only by example the types of programs that would be permissible

¹⁶ S. 1103, 97th Cong., 1st Sess., 127 CONG. REC. 4329-33 (1981).

¹⁷ *Id.* The bill is an attempt by the federal government to consolidate the 44 existing programs providing elementary and secondary education assistance into one program which would provide block grants to state and local governments. *Elementary and Secondary Education Consolidation Act of 1981: Hearings Before the Subcomm. on Education, Arts and Humanities of the Comm. of Labor and Human Resources, 97th Cong., 1st Sess.* 3 (1981) (statement of Mr. Hatch).

¹⁸ S. 1103, 97th Cong., 1st Sess., § 314, 127 CONG. REC. 4331 (1981).

under the statute, and, therefore, does not restrict the states to the program specified. I have reviewed the examples, and only one arguably would pass constitutional muster under the present decisions of the Supreme Court. A program in which the local school districts provide additional in-service training for teachers in public and nonpublic schools should survive constitutional scrutiny. There also are provisions for incentive payments to teachers who do a good job with the educationally disadvantaged.¹⁹ Such a program would resurrect *Lemon v. Kurtzman*,²⁰ if public money under such a program were paid to a parochial school-teacher. In addition, the block-grant proceeds could be used for minor repairs to school buildings.²¹ Under *Nyquist*,²² that type of aid is not available to parochial schools. A consequence of the block-grant program, therefore, apart from its impact on title I, seems to be the removal of a significant number of nonpublic school students from participation in federal education programs.

In summary, the prospects for the continued operation of title I for parochial school students certainly are not as optimistic as they were a year ago. With the problems encountered in the pending litigation and legislation, it can be stated candidly that the future of title I is at best uncertain, and at worst bleak.

¹⁹ S. 1103, 97th Cong., 1st Sess., § 204a-4(B), 127 CONG. REC. 4331 (1981).

²⁰ 403 U.S. 602 (1971). In *Kurtzman*, a Rhode Island statute which provided a 15 percent salary supplement to private schoolteachers was held unconstitutional. *Id.* at 607. The law was enacted to foster the influx of competent teachers to nonpublic schools. *Id.*

²¹ S. 1103, 97th Cong., 1st Sess., § 204(a)(9), 127 CONG. REC. 4331 (1981).

²² *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). In *Nyquist*, a New York statute providing direct subsidies to private schools for maintenance and repair of equipment and facilities was held unconstitutional. *Id.* at 774-80.